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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL A. WOOD and MONICA WOOD, husband and wife, Plaintiffs/Appellees, v. DONALD L. FITZ-SIMMONS, VEDA M. FITZ-SIMMONS, and JANET A. MEDCHILL, as Co-Trustees of the FITZ-SIMMONS 1991 TRUST; FITZ-SIMMONS 1991 TRUST, aka SURVIVOR'S TRUST dated 2/10/98; and unknown heirs of any of the defendants and parties in possession, Defendants/Appellants.	2 CA-CV 2008-0041 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200700219

Honorable Charles A. Irwin, Judge

AFFIRMED

Firm of Dennis M. Breen III, PLC
By Dennis M. Breen III
Tucson
Attorney for Plaintiffs/Appellees

Law Office of Norris L. Ganson
By Norris L. Ganson
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Attorney for Defendants/Appellants

V Á S Q U E Z, Judge.

¶1 In this quiet title action, appellants Donald Fitz-Simmons, Veda Fitz-Simmons, and Janet Medchill, co-trustees of the Fitz-Simmons 1991 Trust ("the Trust") appeal from the trial court's grant of summary judgment in favor of appellees Daniel Wood and Monica Wood. The Trust argues the trial court erred in ruling it was barred by the statute of limitations from enforcing a promissory note Daniel Wood had executed, which was secured by a deed of trust and that the Trust, therefore, no longer had an interest in the subject property. The Trust also contends that even if the statute of limitations had run, Wood was estopped from raising it under the doctrine of equitable estoppel. For the following reasons, we affirm.

Facts and Procedural Background

¶2 We view the facts "in the light most favorable to the party opposing the summary judgment motion below." *Keonjian v. Olcott*, 216 Ariz. 563, ¶ 2, 169 P.3d 927, 928 (App. 2007). As part of a September 1993 transaction involving the transfer of several parcels of real property in Cochise County, Daniel Wood executed a $65,000 promissory note in favor of the Trust and secured by a deed of trust on the subject property, naming the Trust as the beneficiary.[1] The note provided for monthly payments of $662.27 and a maturity date

[1]Daniel Wood executed the note and deed of trust on behalf of Palominas Properties Inc., a corporation of which he and his wife were the incorporators and original shareholders and he and his attorney apparently alternated as president. Although the Trust named Palominas Properties and Daniel Wood as defendants in the 2000 lawsuit, the current action was filed by Daniel Wood and Monica Wood as husband and wife. And Daniel Wood,

of October 2003. In 1994, Wood assigned a cattle lease to the Trust and, other than the lease payments of approximately $300 per month made by the lessee, Wood failed to make any further payments on the note. In 2000, the Trust filed a lawsuit against Daniel Wood, alleging he was in default on the note and the Trust was entitled to the balance due pursuant to the deed of trust's optional acceleration clause. However, because the Trust took no further action after Wood filed his answer to the complaint, the case was dismissed in 2002 for failure to prosecute. Wood filed this quiet title action in 2007, alleging that: 1) the note had been fully satisfied by the assignment of the cattle lease and the transfer of other property; and, 2) "the indebtedness [wa]s time barred" by the six-year limitations period for actions for debt based on a written contract. The court granted summary judgment in favor of Wood on the ground that the statute of limitations had run on the note and deed of trust. This appeal followed.

Discussion

Standard of review

¶3 We review a trial court's grant of summary judgment de novo. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 5, 7 P.3d 979, 981 (App. 2000). Summary judgment is appropriate if there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c).

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acting on behalf of Palominas Properties, transferred the deed of trust to the Woods as community property while the current action was pending. In denying the Trust's motion to dismiss for failure to join Palominas Properties as a party pursuant to Rule 19, Ariz. R. Civ. P., the trial court apparently found the transfer to be valid, and the Trust does not challenge it on appeal.

Statute of limitations

¶4 The Trust first argues the trial court erred in granting summary judgment in favor of Wood because the limitations period for an action on the underlying debt had not yet run. *See* A.R.S. § 12-548 (six-year limitations period for action based on debt arising from written contract). Specifically, it contends its filing of the 2000 lawsuit against Wood did not trigger the deed of trust's acceleration clause. Alternatively, the Trust contends, any acceleration of the debt had been revoked either by its acceptance of partial payments or the dismissal of the 2000 lawsuit. In either case, the Trust argues the limitations period had not commenced. Rather, it maintains its cause of action did not accrue until June 2003, when Wood "defaulted for a second time."

¶5 "A cause of action accrues whenever one person may sue another. In the case of a promissory note, the cause of action accrues and the statute of limitations begins to run when the debt becomes due." *Cheatham v. Sahuaro Collection Serv., Inc.*, 118 Ariz. 452, 454, 577 P.2d 738, 740 (App. 1978) (citation omitted). And the debt is due on an unmatured promissory note with an optional acceleration clause "on the due date of each matured but unpaid installment and, as to unmatured future installments, . . . on the date the creditor exercises the optional acceleration clause." *Navy Fed. Credit Union v. Jones*, 187 Ariz. 493, 494, 930 P.2d 1007, 1008 (App. 1996). A lender exercises its option to accelerate by filing a lawsuit for the entire debt, *Frei v. Hamilton*, 123 Ariz. 544, 547, 601 P.2d 307, 310 (App. 1979), unless the note itself has additional notice requirements, *see Schaeffer v. Chapman*, 176 Ariz. 326, 329, 861 P.2d 611, 614 (1993).

¶6 An affirmative act by the lender is necessary to revoke the acceleration of a debt once that option has been exercised. *Fed. Nat'l Mortgage Ass'n v. Mebane*, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994); *see W. Portland Dev. Co. v. Ward Cook, Inc.*, 424 P.2d 212, 213-14 (Or. 1967) (notice of revocation, executed and recorded by lender, sufficient to revoke acceleration where debtor had not acted in reliance thereon). And, where a debt has been accelerated by the filing of a lawsuit, a trial court's dismissal of the action is not by itself sufficient to revoke the acceleration and extend the limitations period. *Fed. Nat'l Mortgage*, 618 N.Y.S.2d at 89 (court's dismissal of action to collect on accelerated obligation not "an affirmative act by the lender to revoke its election to accelerate" and does not affect running of limitations period).

¶7 A debtor may also reaffirm a debt, preventing the bar of the limitations period, by executing a signed, written agreement after a right of action on the debt has accrued in which the debtor both acknowledges the debt and expresses a willingness to pay. *Steinfeld v. Marteny*, 40 Ariz. 116, 123-24, 10 P.2d 367, 370 (1932); *see* A.R.S. § 12-508. However, the acceptance of partial payments by the lender after the debt has been accelerated is not sufficient to constitute such a reaffirmation. *Cheatham*, 118 Ariz. at 454, 577 P.2d at 740 (rejecting argument that because "part payment of the debt constituted an acknowledgment of the debt and a promise to pay it," limitations period is extended).

¶8 Here, the Trust maintains it "waived the right of acceleration in the first case, that [it] let the earlier suit lapse, and that [it] continued, by mutual consent, to accept new payments against the debt of the Appellees until the default occurred, in 2003." However,

in its complaint filed in the 2000 lawsuit, the Trust expressly "elect[ed] and . . . declare[d] the entire principal balance of the note, together with interest, immediately due and payable." This accelerated the debt, because it complied with the acceleration clause's sole notice requirement, that such notice be given in writing. *See Schaeffer*, 176 Ariz. at 329, 861 P.2d at 614; *Frei*, 123 Ariz. at 547, 601 P.2d at 310.

¶9 Although the Trust apparently continued to accept lease payments from a third party and applied the payments to the indebtedness on the note, it concedes these were only "partial payments." The lease payments were thus insufficient to "constitute[] an acknowledgment of the debt and a promise to pay it" in order to reaffirm the debt and extend the limitations period.[2] *See Cheatham*, 118 Ariz. at 454, 577 P.2d at 740. Nor did dismissal of the 2000 lawsuit as a result of the Trust's failure to prosecute that action constitute an affirmative act by the Trust that could have revoked the acceleration. *See Fed. Nat'l Mortgage*, 618 N.Y.S.2d at 89. Because the acceleration of the debt was never revoked and the debt was never reaffirmed, the Trust's cause of action to recover any debt remaining on the note accrued in 2000. Thus, when Wood filed the present action in 2007 any action on the underlying debt was barred by the six-year statute of limitations. *See* A.R.S. § 12-548; *Forbach v. Steinfeld*, 34 Ariz. 519, 527-28, 273 P. 6, 9 (1928) (finding action for debt barred by statute of limitations when suit initiated within limitations period, but not prosecuted

[2]Furthermore, we find no support in the record for the Trust's contention that the payments were made "by mutual consent"; indeed, there is no evidence that Wood was even aware they were continuing to be made.

within a reasonable time after its commencement). The trial court appropriately entered summary judgment on that basis. *See* A.R.S. § 12-1104.[3]

Equitable estoppel

¶10 The Trust also contends that in the 2000 lawsuit, Wood had argued the Trust had failed to provide adequate notice it was accelerating the debt, and, therefore, the acceleration was ineffective. Consequently, the Trust argues, Wood should be equitably estopped in this case from taking a contradictory position that the debt had been accelerated by the 2000 filing in order to invoke the statute of limitations as a defense. "Where the facts warrant, an Arizona court may apply the doctrine of equitable estoppel to avoid the bar of the statute of limitations." *Cheatham*, 118 Ariz. at 455, 577 P.2d at 741. Equitable estoppel requires that "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz.

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[3]In granting summary judgment, the trial court implicitly found that because the statute of limitations barred an action on the note, it also barred the Trust from raising the debt as a defense in a quiet title action. We recognize this is in direct conflict with the equitable principle that "if it appears there is an unsatisfied balance due a defendant-mortgagee, or his assignee, the court will not quiet the title until and unless he pays off such mortgage lien, though it be barred by limitation." *Farrell v. West*, 57 Ariz. 490, 491, 114 P.2d 910, 911 (1941); *Provident Mut. Building-Loan Ass'n v. Schwertner*, 15 Ariz. 517, 519, 140 P. 495, 496 (1914); *see also De Anza Land & Leisure Corp. v. Raineri*, 137 Ariz. 262, 266, 669 P.2d 1339, 1343 (App. 1983) (referring to principle in dicta). However, in 1941 the legislature enacted A.R.S. § 12-1104, which provides that in a quiet title action: "If it is proved that the interest or lien or the remedy for enforcement thereof is barred by limitation . . . plaintiff shall be entitled to judgment barring and forever estopping assertion of the interest or lien in or to or upon the real property adverse to plaintiff." And the parties do not argue that § 12-1104 should not apply in the present case.

565, ¶ 35, 959 P.2d 1256, 1267-68 (1998). "The vital principle of estoppel is that the one estopped has by his language or conduct led another to do what he would not otherwise have done." *Maricopa Laundry Co. v. Levandoski*, 40 Ariz. 91, 94, 9 P.2d 1014, 1015 (1932).

¶11 The Trust claims the dismissal of the prior lawsuit was a result of its reliance on Wood's answer in that case; Wood had alleged that the Trust "had failed to give notice of acceleration as required in the deed of trust and that the attempt to accelerate was defective." Even if this characterization of Wood's answer were accurate, the Trust was not entitled to rely upon the allegation for estoppel purposes. The Trust was free to draw its own conclusion about what constituted a valid exercise of the acceleration clause simply by referring to the deed of trust. "Reliance is not justified where knowledge to the contrary exists,"*Bohonus v. Amerco*, 124 Ariz. 88, 90, 602 P.2d 469, 471 (1979), and one who acts "'with a careless indifference to means of information reasonably at hand . . . cannot invoke the doctrine of estoppel,'" *Suburban Pump & Water Co. v. Linville*, 60 Ariz. 274, 284-85, 135 P.2d 210, 214 (1943), *quoting* 31 C.J.S. *Estoppel* § 71.

¶12 And in any event, there is no reference to the Trust's acceleration of the debt in the answer Wood filed in the 2000 case. Rather, Wood denied that he had "failed to make the payments as required by the promissory note which was secured by the subject deed of

trust," alleged that the Trust had "never given notice . . . of any default"[4] or any "accounting of the rent collected" from the third-party lease and applied to the mortgage, and that "if Defendants [had been] delinquent in the payments[,] it [wa]s a result of [the Trust's] mismanagement of the property." This position conforms with Wood's position in the current action that the statute of limitations began to run "once the acceleration clause [wa]s enacted and not revoked by some affirmative action." The trial court therefore correctly concluded the doctrine of equitable estoppel did not prevent Wood from arguing that the statute of limitations barred the Trust's claim to the property. *See Valencia Energy Co.*, 191 Ariz. 565, ¶ 35, 959 P.2d at 1267-68.

Disposition

¶13 For the reasons stated above, we affirm the court's grant of summary judgment in favor of Wood. Because the Trust is not the prevailing party, we deny its request for attorney fees pursuant to A.R.S. § 12-341.01.

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GARYE L. VÁSQUEZ, Judge

[4]We are not persuaded by the Trust's argument that Wood's objection to the Trust's failure to give written notice of default should be viewed as a challenge to the validity of the Trust's exercise of the acceleration clause. There simply was no requirement for the Trust to give notice of default in connection with the written notice of acceleration, or otherwise. Thus, Wood's objection could not reasonably have been construed as a challenge to the acceleration of the debt.

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Judge